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QUARTERLY REPORT

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The Quarterly Report provides information on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676, or contact him by e-mail at kmcdowel@doe.state.in.us.

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STUDENT TEST NUMBERS: UTILITY TEMPERED BY CONFIDENTIALITY

With the emphasis on school accountability under state and federal laws, it is becoming increasingly common for states to assign to students “unique tracking numbers” that not only assist in reporting data from a local educational agency (LEA) to the state educational agency (SEA) on such areas as standardized assessment, demographic information, attendance rates, graduation rates, and drop-out rates but also on student mobility. These unique identifiers have different names in different states. In Indiana, these unique identifiers are known as “Student Test Numbers” (STNs).

STNs are assigned by public and accredited nonpublic schools and were implemented prior to the 2002-2003 school year, primarily to assist in the compilation of statistical information in order to assess relative school improvement and through comparison of each student’s standardized assessment results for each grade. See I.C. § 20-31-8 *et seq.*¹ While STNs are helpful in the aggregation and disaggregation of school and student performance data, there is one element to STNs that should not be overlooked: STNs are considered confidential information.

The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, as implemented through 34 C.F.R. Part 99, is the federal law that dictates the procedures for ensuring the confidentiality of personally identifiable information within a student’s education record.² Under FERPA, “personally identifiable information” is defined in relevant part as including “[a] personal identifier, such as the student’s social security number or student number [.]” 34 C.F.R. § 99.3. Such information cannot be disclosed, except under certain specified conditions,³ without first obtaining the written permission of the student’s parent or guardian or the student, if the student is at least 18 years of age. FERPA also defines “disclosure” as permitting “access to or the release, transfer, or other communication of personally identifiable information contained in education records to any party, by any means, including oral, written, or electronic means.” § 99.3.

¹Title 20 of the Indiana Code was recodified during the 2005 session of the General Assembly, effective July 1, 2005. See P.L. 1-2005. The former provisions were at I.C. § 20-10.2-5 *et seq.* In the 2001 session of the General Assembly, the legislature also required the implementation of a system that would “identify each student within a cohort by an individualized identification number” as part of a pilot study for a graduation rate calculation. The non-code provision appeared at P.L. 231-2001, Sec. 3.

²See, *e.g.*, “Educational Records: Dissemination of Personally Identifiable Information under Federal and State Laws,” **Quarterly Report** April-June: 1999.

³See 34 C.F.R. § 99.31 for the instances where personally identifiable information from a student’s education record can be disclosed to a third party without first obtaining the written permission of the student’s parent or guardian or the student, if the student is at least 18 years of age (typically referred to as “eligible student”).

The electronic transfer of data through STNs to the SEA by the LEA does not require the prior written consent of the parent, guardian, or eligible student. See 20 U.S.C. §§ 1232g(b)(1)(C), (b)(3); §§ 99.31(a)(3)(iv), 99.35. It is important, however, to ensure that such data, when transferred electronically, are not communicated impermissibly to an unauthorized third party. To this end, the Indiana Department of Education has established a Virtual Private Network (VPN) to which access can be obtained only by superintendents and principals through user names and passwords.

The assignment of STNs and the corresponding ease in tracking students and their respective records has resulted in potential FERPA violations. The Family Policy Compliance Office (FPCO), which is charged with the enforcement of FERPA, has addressed the use of such unique tracking numbers in several published communications.⁴

In Letter to Shea, 36 IDELR 7 (FPCO 2001), the FPCO reported its results of a complaint investigation involving a Pennsylvania public school district. The parent complained the school district violated FERPA when, without the parent's consent, the student's name and specifics about the student's individualized education program (IEP)⁵ appeared on the school board's agenda. When the parent raised objections, the student's name was replaced with her student number. However, the proposed agenda with the student's name had already been disseminated. The school district argued that by substituting the student's number for her name, it satisfied the confidentiality requirements of FERPA. The FPCO found otherwise, noting that "personally identifiable information" regarding a student includes the student's "social security number or student number." FPCO rejected the school's proposed resolution for this and future agenda items, which would have substituted the student numbers for the students' names.

Based on [the former superintendent's] memo, it appears that the District plans to replace the student's name on its school board meeting agendas and reports with the student's unique student number. As stated above, under FERPA, personally identifiable information specifically includes "a personal identifier, such as the student's social security number or student number." Thus, the District may not disclose to third parties a unique student number or other information that is easily traceable to the student unless the student's parent or eligible student has provided written consent.

⁴For FPCO's responsibilities, see 20 U.S.C. § 1232g(g) and 34 C.F.R. §§ 99.60-99.67.

⁵An IEP is the primary document for the delivery of special education and related services to a student who is eligible for services under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, as implemented through 34 C.F.R. Part 300 and in Indiana through 511 IAC 7-17 *et seq.* ("Article 7").

Access by Other State or Federal Agencies

Last year, the FPCO addressed a number of inquiries from SEAs involving attempts by the Centers for Disease Control and Prevention (CDC) to access information as part of the CDC's population-based surveillance projects for children with autism and other developmental disabilities arising under a different federal law. In some cases, state health departments, acting on behalf of the CDC, were proposing Memoranda of Understanding (MOUs) that would permit access to personally identifiable information, especially through unique student numbers, in order to complete the study.

The FPCO, in Letter to Lloyd-Jones, 41 IDELR 67 (FPCO 2004), noted that the health departments were primarily seeking information from SEAs, whose records generally are not covered by FERPA because students are not typically "in attendance" at the SEA such that the SEA is creating and maintaining "education records" directly related to a "student." LEAs do disclose the contents of education records to the SEA under §§ 99.31(a)(3)(iv) and 99.35; however, FERPA does not contain an exception to the written consent requirement where the third party is not the SEA but the CDC or its state counterpart.

Accordingly, information disclosed to [the SEA] and other officials listed in 34 CFR § 99.31(a)(3) may not be redisclosed in personally identifiable form, intentionally or otherwise, to anyone other than authorized representatives of [the SEA] and must be destroyed when no longer needed for the audit or evaluation purpose for which it was collected. It should be noted that "disclosure" not only means the transmitting or releasing of information to a third party but encompasses permitting a third party to have access to the information in any manner, including oral, written, or electronic means. [Regulatory section omitted.] Thus, allowing a party that is not an official of the SEA to inspect and review personally identifiable information would constitute a "disclosure" of personally identifiable information under FERPA.

Entering into an MOU with the SEA will not make a third party an "official of the SEA," FPCO warned. FPCO noted that there have been increasing concerns about "unlimited discretion [of an SEA] to appoint or designate an 'authorized representative' for data matching purposes," which "essentially vitiates the specific conditions for nonconsensual disclosure under §§ 99.31(a)(3)(iv) and 99.35 and, more generally, FERPA's prohibition on disclosure without written consent." For this reason, for an official to be an "authorized representative" of the SEA, such an official "must be under the direct control of that authority, which means an employee, appointed official, or 'contractor.'" FERPA further defined "contractor" to mean "outsourcing or using third parties to provide services that the State educational authority would otherwise provide for itself, in circumstances where internal disclosure would be appropriate under § 99.35 if the State educational authority were providing the service itself, and where the parties have entered into an agreement that establishes the State educational authority's direct control over the contractor with respect to the service provided by the contractor. Any contractor that obtains access to personally identifiable information from education records in these circumstances is bound by

the same restrictions on redisclosure and destruction of information that apply to the State educational authority itself under § 99.35, and the State educational authority is responsible for ensuring that its contractor does not redisclose or allow any other party to have access to any personally identifiable information from education records.”

In this circumstance, the state health department cannot serve as the “authorized representative” of the SEA because the state health department’s “personnel are not employees, appointed officials, or contractors under the direct control” of the SEA. The SEA “may not enter into an MOU or some other type of agreement” with the state health department “or some other outside agency to disclose personally identifiable information from education records” to the state health department.⁶

FPCO added that the circumstances described do not fit the exception-to-consent requirement where outside researches conduct a “study” on behalf of the SEA. See 20 U.S.C. § 1232g(b)(1)(F), 34 C.F.R. § 99.31(a)(6). Such studies must be concerned with three general areas: (1) to develop, validate, or administer predictive tests; (2) to administer student aid programs; or (3) to improve instruction.

Implicit in the “study” exception is the notion that an educational agency or institution has authorized a study. The fact that an outside entity, on its own initiative, conducts a study which may benefit an educational agency or institution, does not transform the study into one done “for or on behalf of the educational agency or institution.”

There are ways that an LEA or the SEA may participate in the surveillance of children with autism study without violating FERPA. “First, nothing in FERPA prohibits the [SEA] or an LEA or school from disclosing information in aggregate or other non-personally identifiable form.... In order to make sure that student-level information is not personally identifiable, in circumstances that can lead to identification of an individual, the disclosing educational agency or institution (the [SEA] or LEA or school) would need to remove not only the name and ID number but also ‘personal characteristics’ and ‘other information that would make the student’s identity easily traceable’...”

⁶For a similar discussion, see Letter to Wisconsin Department of Public Instruction, 28 IDELR 497 (FPCO 1997), where the FPCO, in a lengthy and wide-ranging analysis, explained that a public school district is not authorized, absent written consent, to disclose the contents of a student’s education record to the state Medicaid agency, nor can public schools release to Medicaid a list of students with disabilities who are receiving services because the presence of a disability is “personally identifiable information.”

A second recourse—though less practical—would be to ask parents for their consent in order to disclose personally identifiable information to the state health department.⁷

Effect of State Public Access Laws

States have various legislative enactments intended to provide the widest possible access by members of the public to the records maintained by governmental entities and political subdivisions of the state. Although the legislative intent is typically one of openness rather than access restrictions, access is not an absolute right, especially where federal law dictates otherwise.

In Letter to Forgione (January 20, 2004),⁸ a Texas school district received a request under Texas law for student data that would be linked to a “unique tracking number” for each student and provided via computer tape in order to establish a data base that would track student achievement on an individual student basis from year to year. This “unique tracking number” would be linked to each student’s social security number and student ID number, with the “unique tracking number” maintained in each student’s education record. The following information had been requested from the public school district: grade level; sex; ethnicity; whether the student was eligible for special education services; whether the student was classified as limited English proficient; whether the student was classified as economically disadvantaged; whether the student received Title I funds; whether the student was classified as a Migrant student; whether the student was bilingual; and whether the student was classified as gifted and talented. Also requested was data as to student performance on standardized tests and whether such tests were administered in Braille, large print, or were read to the student.

Texas law does permit the disclosure of aggregate student data by sex, ethnicity, subject area, grade level, campus, and school district. The school district had two general questions for FPCO.

1. Does substituting a personal identifier, such as a Social Security Number, with a unique tracking number violate FERPA?

The District’s records of student achievement and identification numbers of any kind are clearly protected as “education records” under current FERPA regulations. A “unique tracking number,” like a social security or other student identification number, is “directly related” to a

⁷The FPCO issued a similar letter to the Pennsylvania Department of Education, addressing access sought by an agent of the CDC on information necessary for the CDC to conduct its autism prevalence study. The Letter to Foerster (February 25, 2004) can be viewed and downloaded at the FPCO’s web site at <http://www.ed.gov/policy/gen/guid/fpc/ferpa/library/pacdc.html>.

⁸The FPCO at one time made available this letter at its web site. It is no longer available on-line but can be obtained by request of the Indiana Department of Education’s Legal Section. FPCO’s web site is <http://www.ed.gov/policy/gen/guid/fpc/index.html>.

student once it is assigned or linked to the student or the student's records. Information that has been coded through the use of identification numbers remains "directly related" to a student even if the student's name is not identifiable, or easily identifiable, as a result... [A] unique tracking number is also "personally identifiable information" under FERPA. Accordingly, under current regulations, the only valid way for the District to disclose the information in question under [Texas law] is to prepare and disclose it on an aggregated rather than an individual basis.

Although FERPA contains some exceptions to the requirement that written consent be obtained before "personally identifiable information" from a student's education record be disclosed, none of these exceptions is implicated in this situation. "[N]othing in FERPA permits the disclosure of student achievement or other information from a student's education records to the general public via a unique tracking number without prior written consent."⁹

2. *Does the changing of the student's Social Security Number or Student ID Number to a Unique Tracking Number still create a "personal identifier" subject to FERPA requirements?*

FPCO noted that "personally identifiable information" and "identity" under FERPA are not limited to names, addresses, date and place of birth, physical descriptions, and similar characteristics, but can also include a "personal identifier" such as a social security number or student number. "...FERPA recognizes that identification numbers are unique personal identifiers even though they do not reveal a person's name or other characteristics without the appropriate key to 'decode' the number and link it to a name or record. As such, FERPA prohibits disclosure of identification numbers on the basis that they are 'personally identifiable information.'"

FERPA "prohibits the disclosure of information from an education record that is identified by name or a unique personal number, even though an identification number does not reveal an individual's name. For this reason, we conclude that the District may not create a unique tracking number linked to each individual student record and disclose that information, without prior written consent, to a member of the public [through] a State open records request."

FPCO stressed that student identification numbers are always "personally identifiable information" and cannot be designated as "directory information" that can be disclosed to anyone. "This Office has consistently advised that under no circumstances may a student's social security number or other identification number be designated and disclosed as 'directory information' under FERPA. Unlike names and address, social security numbers are not merely identifiers but may easily be linked or used to obtain access to additional information about an

⁹FPCO did indicate that should the school district wish to evaluate its own programs, it could "outsource this function and provide an outside entity access to the information as an agent of the school district. The outside entity may only have access to the education records in order to conduct the evaluation on the District's behalf and may not use the information for any other purpose."

individual, such as credit, employment, health, and motor vehicle information, that would be harmful or an invasion of privacy if disclosed....

“[S]tudent identification numbers and unique tracking numbers are not, like names, mere identifiers but provide access to sensitive information such as grades and test scores. Accordingly, these numbers may not be designated and disclosed as directory information under FERPA.”¹⁰

Letter to Forgione was not the only FERPA question pending in Texas. In Fish v. Dallas Ind. Sch. Dist., 170 S.W. 3d 226 (Tex. App. 2005), the plaintiff requested the school district provide student test results for an eleven-year period. He wanted the information broken down in 19 categories including student number, sex, age, ethnicity, disability, English proficiency, campus name, grade level, teacher number and test date. “In an effort to maintain the students’ confidentiality, Fish requested that a ‘unique number be placed in the field for student and teacher name and that the number be consistent from year to year.’” The school district and Fish disagreed as to access. He filed suit. Following a three-day jury trial, the jury found that although the requested information, when considered separately, was not “personally identifiable information,” when considered in combination, the information was “easily traceable” such that anyone using the data could obtain “personally identifiable information.” As a consequence, Fish was not entitled to the data.

Fish appealed, but the Texas Court of Appeals affirmed the lower court’s result. The appellate court noted that the school district’s two experts testified (and demonstrated) how a student’s identification could be traced using the data Fish requested. Even using “individual random numbers to mask student data” did not prevent one of the expert witnesses from identifying individual students. In one minute, he matched 550 of 800 students at an elementary school. He could match all 400,000 students over the eleven-year period in “less than twenty minutes” using the data Fish sought.

Continuity of Care: Local Agreements Between Public Schools and Health-Care Providers

Some public school districts have entered into agreements with health-care providers to make available certain services to students. In some cases, the outside provider has requested access to STNs in order to track the student’s health history. As noted above, this presents FERPA concerns where the access to STNs is not related to the provision of the health care services. Often, the access has been provided in an indiscriminate manner because not all or most students

¹⁰See also Letter to the University of Illinois (November 26, 2004), available at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/ryanuillinois.html>, reiterating that student ID numbers are never considered “directory information.” Also see Letter to University of Wisconsin-River Falls (November 5, 2004), available at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/uwisc.html>, explaining that a student’s user or account log-on ID, including a student’s assigned e-mail address used as a log-on ID, could be “directory information” so long as a person with access to such a number could not access non-directory information about the student.

have received any service from the provider. Because of several instances where this occurred, the Indiana Department of Education, on November 29, 2004, sent out an advisory to public and publicly funded schools that are obliged to follow FERPA's dictates:

An issue had arisen regarding the propriety of permitting access by a third party to Student Test Numbers (STNs) for the purpose of ensuring continuity of care for students who receive medical services through clinics operated by a health-care provider. The health-care provider has represented that its system for documenting medical data on students and making this available to school administrators is compliant with federal confidentiality laws.

Publicly funded schools in Indiana are obliged to comply with the requirements of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, as implemented through 34 CFR Part 99. FERPA proscribes the release to a third party of "personally identifiable information" from a student's "education record" without first obtaining the signed, dated, written consent of the student's parent/guardian, or the student, if the student is at least 18 years of age ("eligible student"). See 34 CFR § 99.30.

FERPA's definition for "personally identifiable information" at § 99.3 defines this concept in relevant part as "[a] personal identifier, such as the student's social security number or student number." A student's STN in Indiana is a "personal identifier" and, as a consequence, "personally identifiable information" that is subject to the pre-conditions for disclosure to a third party (signed, dated, written consent of the parent/guardian or eligible student).

The Family Policy Compliance Office (FPCO), the federal agency responsible for the enforcement of FERPA, see §§ 99.60-99.67, has been emphatic that Student Test Numbers are "personally identifiable information" subject to prior consent requirements. In a recent communication, the FPCO noted that "nothing in FERPA permits the disclosure of student achievement or other information from a student's education records to the general public via a unique tracking number without prior written consent." See *Letter to Forgione* (FPCO, January 24, 2004) [see *supra*].

Although FERPA does contain exceptions to the requirement to obtain signed, dated, written consent prior to disclosure, these are few in number and strictly construed. See § 99.31(a).

The disclosure contemplated by the third-party health-care provider is not within any of FERPA's exceptions. In order to provide STNs to a third party under such circumstances, the signed, dated, written consent of each parent/guardian or eligible student would have to be obtained prior to disclosure of the STN to the third party, as required by § 99.30.

“STRIP SEARCHES” OF STUDENTS: EXPECTATIONS OF PRIVACY, “RELIABLE INFORMANTS,” AND “SPECIAL RELATIONSHIPS”

By Kylee K. Bassett, Legal Intern¹¹

New Jersey v. T.L.O., 469 U.S. 325, 105 S. Ct. 733 (1985), is the seminal U.S. Supreme Court decision regarding the constitutional limits on searches of students, especially within the public school context. T.L.O. established a two-fold inquiry for searches of students by school personnel where there is a reasonable suspicion to believe that a law or school rule has been broken.

1. The search must be “justified at its inception” (a law or school rule is being broken or there is a reasonable basis to believe such will occur); and
2. The search must be “reasonably related in scope to the circumstances which justified the interference in the first place.”

In addition, “such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” T.L.O., 469 U.S. at 342, 105 S. Ct. at 743.

T.L.O., however, did not involve so-called “strip searches” of students.¹² Prior to T.L.O., the U.S. 7th Circuit Court of Appeals did have the opportunity to address the constitutionality of such invasive searches. In Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980), *reh. den.* 635 F.2d 582 (1980), *cert. den.* 451 U.S. 1022, 101 S. Ct. 3015 (1982), the 7th Circuit addressed a suspicionless “strip search” of students in search of contraband at an Indiana public school:

It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of some magnitude. More than that: it is a violation of any known principle of human decency. Apart from any constitutional readings and rulings, simple common sense would indicate that the conduct of school officials in permitting such a nude search was not only unlawful but outrageous under “settled indisputable principles of law.”

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¹²A “strip search” of students typically involves the students being separated by gender and marshaled into an area of privacy where they are required individually to partially disrobe and pull their clothes away from their person, all in the presence of school personnel of the same gender.

Doe v. Renfrow, 631 F.2d at 92-93, quoting Wood v. Strickland, 420 U.S. 308, 321, 95 S. Ct. 992, 1000 (1975).

Indiana courts have followed the Renfrow and T.L.O. holdings, generally finding disfavor with such procedures except where there are exigent circumstances that would warrant such invasive procedures.¹³ In Oliver v. McClung, 919 F.Supp. 1206 (N.D. Ind. 1995), the federal district court found the public school violated the constitutional rights of middle school students when a “strip search” was performed on seventh-grade female students in search of missing money. The court noted there was no imminent threat of harm from weapons or drugs that would have justified such a search.

In Higginbottom v. Kiethly, 103 F.Supp.2d 1075 (S.D. Ind. 2000), the court granted in part and denied in part the school district’s and teacher’s Motion for Summary Judgment for claims arising out of a “strip search” of four sixth-grade boys when money turned up missing from a snack cart. The money was later found on the person of another student.¹⁴

While the federal courts have been fairly consistent in analyzing such searches in light of the exigent circumstances, especially in light of any imminent harm and with consideration for the age and sex of the students, not all courts have done so. The 11th Circuit broke ranks with the other courts that have decided this matter, finding that the law in this area is too unsettled to find that school officials who conducted such a search were “on notice” that such a search without any imminent harm would constitute a violation of the Fourth Amendment. See Jenkins v. Talladega City Board of Education, 115 F.3d 821 (11th Cir. 1997), where two second-grade female students were “strip searched” when \$7.00 was reported stolen. Jenkins has been criticized by other courts and has stood alone in excusing such invasive procedures for often trivial reasons.

Until now.

The Sixth Circuit Joins the 11th Circuit

Beard v. Whitmore Lake School District, 402 F.3d 598 (6th Cir. 2005).

¹³Circumstances that have warranted such invasive searches have included safety concerns, including reasonable suspicion of drug possession. These circumstances are often affected by the known disciplinary history of the student or the reliability of the source of information. See, e.g., Cornfield v. Consolidated High School District No. 230, 991 F.2d 1316 (7th Cir. 1993), where a 16-year-old student with a significant disciplinary and behavioral history was suspected of “crotching” drugs. Justice John Paul Stevens, in T.L.O. (concurring in part and dissenting in part), also wrote that “to the extent that deeply intrusive searches are ever reasonable outside the custodial context, it surely must only be to prevent imminent and serious harm.” T.L.O., 469 U.S. at 383, 105 S. Ct. 764, n. 25.

¹⁴See **Quarterly Report**, April-June: 2000.

The 11th Circuit Court of Appeals, in its decision in Jenkins v. Talladega City Bd. of Education, 115 F.3d 821 (11th Cir. 1997) no longer stands alone regarding its reasoning with respect to “strip searches.”¹⁵ In Beard v. Whitmore Lake School District, 402 F.3d 598 (6th Cir. 2005), the 6th Circuit Court of Appeals agreed with the 11th Circuit. The 6th Circuit reversed the federal district court’s denial of the defendant’s Motion for Summary Judgment. It reasoned that the teachers and police officers were protected by qualified immunity (even though their behavior was unconstitutional), finding that “the law did not *clearly establish* that the searches were unconstitutional under these circumstances.” Beard, 402 F.3d at 602 (emphasis added).

This case (like many of the previous reported ones) involved stolen money. A female student notified her gym teacher that her prom money had been stolen during the class. Because the school principal was absent on the day of the theft, the gym teacher reported the incident to the acting principal, a female teacher. After being notified, the acting principal contacted the police to report the incident. Subsequently, the acting principal asked two female teachers and one male teacher to assist her in the search for the missing prom money. Both the male and female students’ backpacks and lockers were searched; however, the money was not recovered. The male students were searched individually in the shower room. The male students’ “strip searches”¹⁶ consisted of lowering their pants and underwear, as well as removing their shirts.¹⁷ According to the teachers, about half-way through the search of the male students, the police officer arrived in the boys’ locker room. He indicated the teachers should continue conducting the searches because “teachers had ‘a lot more leeway’ than police officers when it came to searching students.” Id. at 601. The officer spoke to the acting principal and asked if the girls had been searched. According to the acting principal, the officer told her that “the boys had been checked in their underwear and that the teachers needed to check the girls in the same way so as to prevent any claims of gender discrimination.” Id. at 602. Upon the officer’s advice, the acting principal and another female teacher took the girls into the locker room and had the girls “pull up their shirts and pull down their pants while standing in a circle.”¹⁸ Id. The money was never recovered. A 42 U.S.C. §1983 action was brought against the school and its teachers, as well as the officer involved in the incident, asserting constitutional deprivations.¹⁹

Accepting the plaintiffs’ allegations as factual for the purpose of analyzing this interlocutory appeal, the 6th Circuit found the searches to be unreasonable and in violation of the Fourth

¹⁵See **Quarterly Report** July-September: 1997 and **Quarterly Report** January-March: 1999.

¹⁶There are factual disputes regarding the “strip search” as to whether the boys were told to remove their clothing and whether the boys removed their underwear.

¹⁷No physical touching of the male students occurred.

¹⁸The girls were not physically touched and were not required to remove their underwear. Another factual dispute existed as to whether they were required to participate.

¹⁹42 U.S.C. § 1983 does not create any right or benefit on its own. It is a means to enforce a right or benefit under the U.S. Constitution or federal statute.

Amendment. In this case, over 20 students were searched “in the absence of individualized suspicion and without consent.” *Id.* at 603. The 6th Circuit analyzed the Fourth Amendment violation in light of two Supreme Court decisions: New Jersey v. T.L.O., 469 U.S. 325, 105 S. Ct. 733 (1985)²⁰ and Vernonia v. Sch. Dist. 47J v. Acton, 515 U.S. 646, 115 S. Ct. 2386 (1995) (upholding a school system’s policy of randomly drug-testing student-athletes even in the absence of individualized suspicion). In order to determine the reasonableness of the “strip searches,” the 6th Circuit referred to the “twofold inquiry”²¹ set forth in T.L.O. Although the 6th Circuit found that the searches were “justified at their inception,” it found that the searches were unreasonable. The 6th Circuit cited the three factors²² in Vernonia to properly analyze whether the searches without individualized suspicion passed constitutional muster under the Fourth Amendment. Relying on the three factors, the 6th Circuit determined that the strip searches violated the Fourth Amendment:²³

The highly intrusive nature of the searches, the fact that the searches were undertaken to find missing money [versus a drug situation], the fact that the searches were performed on a substantial number of students, the fact that the searches were performed in the absence of individualized suspicion, and the lack of consent, taken together, demonstrate that the searches were not reasonable.

Beard, 402 F.3d at 605.

Although the actions of school personnel and the police officer were unconstitutional, the 6th Circuit opined that the participants in this impermissible “strip search” were “protected from civil liability if their actions did not violate ‘clearly established statutory or constitutional rights of which a reasonable person would have known.’” *Id.* at 606, quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727 (1982).

“In order for the law to be clearly established as of the date of the incident, the law ‘must truly compel (not just suggest or allow or raise a question about), the conclusion . . . that what

²⁰Refer to **Quarterly Report** July-September: 1997 and **Quarterly Report** August-January: 2000 for the specifics of New Jersey v. T.L.O.

²¹The twofold inquiry consists of: 1) was the action justified at its inception; and 2) was the search reasonably related in scope to the circumstances justifying the search. Beard, 402 F.3d at 603-04, citing T.L.O.

²²The three factors are: 1) the student’s legitimate expectation of privacy; 2) the intrusiveness of the search; and 3) the severity of the school system’s needs that were met by the search.

²³Although the court used this reasoning to conclude that the boys’ searches were unconstitutional, the searches conducted on the girls were found to be unconstitutional for essentially the same reasoning.

defendant is doing violates federal law *in the circumstances.*” Id. at 607, quoting Saylor v. Bd. of Educ., 118 F.3d 507, 515-516 (6th Cir. 1997) (emphasis original). Ironically, after applying T.L.O. and Vernonia to support its conclusion that the “strip searches” under these circumstances were unconstitutional, the 6th Circuit again employed T.L.O. and Vernonia to support its conclusion that the law did not clearly establish that the searches were unconstitutional. The 6th Circuit maintained that these cases “set forth principles of law relating to school searches, yet do not offer the guidance necessary to conclude that the officials here were, or should have been, on notice that the searches performed in this case were unreasonable.” Id. Furthermore, because of the lack of factual similarities between this case and the two Supreme Court decisions, “T.L.O. and Vernonia could not have ‘truly compelled’ [the school officials and police officer] to realize that they were acting illegally when they participated in the searches of the students in this case.” Id.

Further, the 6th Circuit acknowledged the 7th Circuit cases²⁴ that held such “strip searches” (with several closely analogous to this case) to be unreasonable. However, the 6th Circuit declined to find such decisions authoritative, stating that “[t]he cases dealing with school strip searches from courts in other circuits are not ‘clearly foreshadowed by applicable direct authority,’ and therefore do not clearly establish that the searches in this case were unreasonable.” Id. at 608. In short, a school administrator within the 6th Circuit is not on notice of findings by federal courts from other jurisdictions.

State Court Follows Suit

Lamb v. Holmes, 162 S.W.3d 902 (Ky. Sup. Ct., 2005)

Within a month after the Beard decision, the Kentucky Supreme Court ruled on a similar matter, invoking the 6th Circuit’s reasoning as justification for its own conclusion as to why school officials should be immune from suit for a “strip search.” Lamb began when a female middle school student in gym class reported a pair of her shorts missing. The classroom teachers instructed the students that they had five minutes to return the missing shorts. When the shorts were not returned, the classroom teachers notified the administration, which included an administrative intern and the assistant principal as well as a security guard. Subsequently, the students were informed that they would be searched in an attempt to find the shorts. Then, the students were taken into the locker room and searched by pairs. As to what took place in the girls’ locker room, there is a factual dispute. The girls claimed that they were required to “pull their shorts down beneath their knees and to raise their shirts above their breasts, exposing their underwear to those around them.” Lamb at 903. However, the teachers and administrators maintained that they only required the girls turn over their waistband so that they could see if any of the students were wearing the missing shorts. Three girls (including one who refused to be searched) involved in the search filed a §1983 claim (along with other claims) against the teachers and administrators. The trial court ruled that the students’ rights were not violated and

²⁴The 6th Circuit cited to several cases that have already been discussed in **Quarterly Report** July-September: 1997 and **Quarterly Report** August-January: 2000.

dismissed all of the claims. The students appealed the trial court's decision, and the Kentucky Court of Appeals concluded the trial court erred in dismissing the §1983 claim. The Kentucky Supreme Court granted discretionary review to decide whether the Court of Appeals correctly decided three issues relating to: 1) the Fourth Amendment; 2) availability of qualified immunity; and 3) whether there was a ministerial duty as a result of the school board policy regarding strip searches.

Fourth Amendment Analysis

How the court applies the facts determines whether the “strip search” was unconstitutional. The court determined that if the facts the students alleged were true, then the “strip searches” would be considered unconstitutional. However, if the “strip searches” were conducted in the fashion in which the teachers and administrators described, the searches would not be considered unconstitutional. This court, in light of Beard, set forth six factors in which the “strip searches” would be considered unconstitutional based on the students' accounts:

- 1) the searches were intrusive in nature,
- 2) the searches were conducted to find a missing pair of shorts,
- 3) a large number of students were subject to the searches,
- 4) the searches lacked individualized suspicion,
- 5) the students did not consent to the searches, and
- 6) the searches were conducted in front of other students.

Lamb at 907. Moreover, the court noted the searches would be constitutional if, as described by the teachers, “the scope of such a search would not exceed what a student would expect in a locker room setting and could not be deemed intrusive as a search requiring exposure of one's underwear to others, be they students and/or teachers/administrators.” Id. The court avoided making a factual determination because it held that “the law, at the time these searches were conducted, did not clearly establish searches conducted in either described manner would be unreasonable, and therefore the teachers/administrators are entitled to qualified immunity.” Id.

Qualified Immunity

“Qualified immunity protects state and local officials who carry out executive and administrative functions from personal liability so long as their actions do not violate ‘clearly established statutory or constitutional rights of which a reasonable person would have known.’” Id., quoting Harlow, 457 U.S. at 818. Furthermore, the U.S. Supreme Court in Harlow required that the “objective reasonableness standard requires a determination as to whether the defendant official had ‘fair warning’ that his/her conduct violated federal law.” Id. The court noted that the only available state decision on the issue held that there “were reasonable grounds for strip searching a student to determine whether he was carrying drugs and that student was never offensively touched.” Id. at 908. (See Rone v. Daviess County Bd. Of Educ., 655 S.W.2d 28 (Ky. App. 1983).) Subsequently, this court agreed with the 6th Circuit's decision in Beard and held that the

teachers and administrators were not given “fair warning” because the law was not clearly established that such actions would violate the Fourth Amendment.

Ministerial Duties and the Board Policy against Strip Searches

The state court tackled the issue of ministerial duties as far as qualified immunity in connection with the school board’s policy regarding “strip searches.” The court in Harlow “limited the application of a qualified immunity defense to ‘officials performing discretionary functions,’ [but] left unresolved the immunity applicable to [those] who perform ministerial acts.” Id. The court further explained that “qualified official immunity applies to the negligent performance by a public officer or employee of: (1) discretionary acts or functions. . .; (2) in good faith; and (3) within the scope of the employee’s authority.” Id. at 909, citing *Restatement (Second) of Torts*, § 895D.

The students argued that “the written Board policy preempted any claim that [the school’s] actions were discretionary.” Id. Furthermore, the students maintained that the definition of the term “strip search” used in the Board’s policy encompassed a meaning far less than a nude search, therefore not entitling the school officials to qualified immunity.

At the time of the “strip search,” the Board had in effect a policy regarding “strip searches” that stated: “in no instance shall [a] school official strip search any student.” Id. at 903. However, the term “strip search” was not defined anywhere in the Board’s policy. Since the term was not defined, the court decided to use the “plain meaning” rule.²⁵ The court found that the majority of cases defined “strip search” as requiring the removal of clothing. To further emphasize the reasonableness of the plain meaning of the term “strip search,” the court looked to several cases where courts interpreted the term “‘strip search’ as a nude search, or search far more invasive than those endured by the female students in this case.” Id. at 909.

The court held the Board’s policy did not coincide with the actual events because the interpretation of the term “strip search” means nothing less than a nude search. Finally, the court decided that the school officials were entitled to qualified immunity since their behavior was “made in good faith, discretionary in nature and within the scope of their authority.” Id. at 911.

Reasonable Suspicion and the “Reliable Informant”

Although the Beard and Lamb courts decided to adopt the minority reasoning from the 11th Circuit, courts in other jurisdictions continue to analyze such incidents under the traditional rubrics. The following two cases illustrate the circumstance where the informant is considered reliable and the “reasonable suspicion” involves possession of drugs.

²⁵The court determined that the plain meaning of “strip search” should be “applied to the Board’s policy as such would not produce an absurd result, but rather the most reasonable outcome.” Id. at 909.

Fewless ex rel. Fewless v. Bd. of Education of Wayland, 208 F.Supp.2d 806 (W.D. Mich. 2002). Fewless involved a fourteen-year-old special education student with Attention Deficit Hyperactivity Disorder (ADHD) who was accused of possessing marijuana on the school's premises by four general education students ("informants"). The four informants alleged that the student possessed marijuana in a dime roll that was supposedly shown to them during their home improvement class.²⁶ After the reported accusation, the student was confronted by the assistant principal. In the initial search, the student admitted to showing the informants the dime roll, but denied the allegation that he had marijuana. No marijuana was found after the assistant principal searched the student's gym bag, dime roll, and pockets.²⁷ Later in the day after the first search, two of the informants again reported to the assistant principal that the student hid the marijuana in his "butt crack." Id. at 810. In addition to the informants' allegation, the home improvement teacher reported that the informants had told him that the student had the drugs down "the crack of his ass."²⁸ Id. Based on this information, the assistant principal informed a school security person of the situation. The student was taken into the assistant principal's office where he was informed of the new allegations of the marijuana being hidden between his buttocks. The assistant principal and the school security officer claimed that the school security officer explained to the student three times that the search had to be done "freely and voluntarily" before the assistant principal requested that the student "drop his drawers."²⁹ Id. at 811. At each request, the student stated that he had nothing to hide.

The student had a different version of the strip search. The student denied ever being told that the strip search had to be voluntary; furthermore, he claimed that he had to drop his pants as well as his boxers to his ankles so that the school security officer could view his "front side." The second search, like the first, failed to find the student in possession of marijuana. Thereafter, the parents of the student filed an action against the assistant principal and the school security officer for performing an illegal strip search in violation of their son's Fourth and Fourteenth Amendment constitutional rights. In order to determine whether the student's rights were violated the court looked at 1) whether the student gave legally valid consent, and 2) whether the search was reasonable.

²⁶In an interesting set of facts, the day after the student was searched, all four informants were scheduled to serve a detention for an incident in their home improvement class which involved the destruction of the student's lawn mower.

²⁷The legality of the first search was not at issue in this case.

²⁸The classroom teacher only reported to the assistant principal the statements the informants made to him. The teacher did not report anything to the fact that he saw marijuana, personally heard the student say that it was in his "butt crack," witnessed the student acting suspiciously, or smelled marijuana on the student.

²⁹The defendants claimed that the performed "strip search" consisted of the student lowering his pants to about four or five inches above the knee while the school security officer examined the waistband of the student's boxer shorts in the back and looking at the student's buttocks.

Consent to Search

The federal district court stated that “[a] search authorized by consent of the searched individual is constitutionally permissible, as long as the consent was given both freely and voluntarily.” *Id.* at 813, citing Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973). In order to determine the voluntariness of consent,³⁰ the court reasoned that it “should examine the characteristics of the searched individual, including age, intelligence, and education; whether the individual understands the right to refuse to consent; and whether the individual understands his or her constitutional rights.” *Id.* (citing United States v. Jones, 846 F.2d 358, 360 (6th Cir. 1988)).

Because of the student’s motion for summary judgment, the court looked at the facts most favorable to the school. It was still evident, however, that the school officials knew the age of the student, knew the student was considered a special education student, had ADHD, and did not choose to call his parent beforehand. The school officials reported that they gave the student an option to refuse a “strip search” and that they would leave the office if he did so.³¹ The court noted that even if the student consented to the search, he was ill-informed of the intrusive nature of the type of search they were to conduct on his person. Furthermore, the court found that given the school official’s knowledge of “his vulnerability, youth, and behavioral conditions impacting his impulse control and decision-making capacity. . .[as well as not being] provided an opportunity to speak to someone who was an advocate for him...[h]e never gave explicit, clear consent to be search.” *Id.* at 815.

Reasonableness of Search

The court referred to New Jersey v. T.L.O. to determine whether the search in Fewless was within the strictures of the Fourth Amendment. The court held that the strip search of the student was “neither justified nor was it reasonable in scope.” *Id.* at 816. The court even goes as far as to state that with the available evidence it should have “led [a] reasonable official *not* to strip search [the student] without further investigation.” *Id.*

The court expressed concern with several of the factors that led school officials to decide to perform a “strip search.” In this case because of the prior incident involving the student that resulted in the informants having to serve a detention, the court noted that “the informants’ credibility was of a highly questionable nature, given their potential ill motives.” *Id.* at 819. Further, the school found no evidence of marijuana after searching his bookbag and pockets. Although the student had lied to authority figures before, it was not in association with drug-related activity. In addition, the court found the search of the buttocks to be pointless and

³⁰The burden of proof rests on the defendants to show that the consent was voluntary.

³¹On an interesting note, even if the student would have refused to allow a strip search, the school’s policy instructs its school officials “to attempt to receive consent to be searched from the student, including informing the student of his or her right to refuse consent, but instructs that ‘the principal *shall* conduct the search, however, *with or without the consent.*’” *Id.* at 814, n. 12 (emphasis added).

unreasonable under the circumstances. Therefore, summary judgment for the student was granted.

Phaneuf v. Cipriano, 330 F.Supp.2d 74 (D. Conn. 2004)

In Phaneuf, during a security bag check of senior students before the departure to an off-campus location for their senior picnic, the plaintiff was “strip searched” after another “reliable”³² student informed the teacher that the plaintiff, to avoid the bag search, hid her marijuana in her pants. The teacher notified the school principal. After confronting the student about her alleged possession of marijuana, the principal escorted the student to the nurse’s office where she informed the substitute school nurse (also a named defendant) that she had to conduct a “strip search” of the student’s underpants (specifically, instructing her to “open and check” that area). The nurse expressed her reluctance in performing the search. Subsequently, the student’s mother was called and requested to come in to personally conduct the “strip search” on her daughter. Before the student’s mother arrived, the principal found cigarettes and a lighter in her bag, which violated school rules.

The “strip search” was conducted in a small room³³ by the mother with the substitute nurse standing behind her.³⁴ During the strip search, the student “lifted up her shirt and pulled down her bra. . .dropped her skirt to the floor [and]. . .pulled her underpants away from her body to show that there was no marijuana. . . .” Id. at 76. No marijuana or illegal substances were found. The student filed a complaint alleging a Fourth Amendment violation, but the defendants filed a Motion for Summary Judgment.

³²According to the teacher and principal’s report, the informant was considered credible because she worked closely with office staff as an office aid.

³³A curtain separated the doorway of the small room from the common area.

³⁴There is a dispute in facts regarding whether or not the nurse turned away while the search was performed or watched the search.

Reasonableness at the Inception of the Search.

Looking to T.L.O. and because of the specific tip from a reliable student, the teacher's and principal's subjective impression that the student was lying, her past disciplinary problems, and the discovery of the cigarettes and lighter, the school argued that there was sufficient evidence to have a reasonable suspicion that the student was carrying marijuana. In its analysis, the federal district court stated:

[I]n determining the reasonable[ness] of the search, a court does not look at the circumstances at the moment the defendants first announced their intention to perform a strip search. Rather, the court looks at the circumstances as they existed at the moment the defendants performed the strip search. Such circumstances include the quality of the tip,³⁵ the subjective suspicion of a teacher's observations, and the student's past disciplinary problems.

Id. at 79 (internal citation omitted), quoting from DesRoches by DesRoches v. Caprio, 156 F.3d 571, 577-78 (4th Cir. 1998). After considering the above factors, the court determined that the search was reasonable at its inception. The court reasoned that the school: 1) had a specific tip from a reliable student (who was specific as to the type of illegal substance and to where it was located); 2) had knowledge of the student's past disciplinary problems; 3) had observed the student's suspicious denial of the accusation; and 4) had a higher level of suspicion after finding other contraband on the student.

Reasonableness in Scope of the Search

The student maintained that the search was "excessively intrusive in the light of her age and sex and the nature of the infraction. Specifically, she [argued] that the search went beyond that required by the information against her because it included the removal of her shirt and bra."³⁶ Id. at 81. However, the school claimed that the search was not intrusive in that the mother conducted the strip search, the nurse stood with her back to the search, and the student was not required to remove her clothing.

³⁵The court cites to C.B. By and Through Breeding v. Driscoll, 82 F.3d 383 (11th Cir. 1996) using the "quality of the tip" as one factor in determining the reasonableness of the search. In C.B., again involving a situation related to drugs on school grounds, the court held that "the search of the student's coat pockets based only by the tip of another student" was not unconstitutional. Phaneuf, 330 F. Supp.2d at 79.

³⁶Because of the accusation that the marijuana was in her underwear, the student argued that it, therefore, was not necessary to check her *shirt and bra*. However, the school maintained that they did not order an upper body search, and that the student initiated that particular disclosure without instruction to do so by them.

Since the mother was called in to perform the “strip search,” the court opined that the intrusive search was within the scope of a reasonable search. Furthermore, even though there was a dispute as to whether the nurse witnessed the actual search, the court found that the nurse was a female and was appropriate because of her a medical background. As far as the curtain (instead of an actual door) that was used as a partition, the court determined that it was reasonable since no one else was in the nurse’s station.

Nature of the Suspected Allegation

The court pointed out that “the Supreme Court has many times upheld the reasonableness of searches and subsequent invasion of privacy when concerned with drug use and possession in the nation’s schools.” *Id.* at 82. Specifically, in this case, the students were to attend a picnic at an off-campus destination where the “students were more vulnerable to the negative influence of drugs while off campus.” *Id.* Therefore, the school (with the students being under its guardianship) was justified to thoroughly investigate its suspicion.

“Special Relationship” and the “Strip Search” Analysis

The following case involves peculiar facts that raise the “special relationship” analysis discussed in other contexts, usually with regard to student suicides and attempted suicides.³⁷

Teague v. Texas City Independent School District, 348 F.Supp.2d 785 (S.D. Tex. 2004)

In Teague the parent of a female student who had Down’s syndrome and mental retardation filed an action against the school district under 42 U.S.C. §1983. The student attended a specially segregated and highly structured special education classroom at the high school. In an unfortunate event while in the special education classroom, another student forced her into the bathroom and sexually assaulted her. Without notifying the parents of the assault, the school officials escorted her into the office, questioned her, and forced her to disrobe. Subsequently, the parents filed this claim alleging that the school “failed to properly monitor and supervise the special education students and that [the school] used excessive force when it ordered [the student] to disrobe.” *Id.* at 787-88. However, the school moved for dismissal for failure to state a claim upon which relief can be granted, pursuant to *Fed. R. Civ. P. 12(b)(6)*.³⁸ The school made several arguments to support its motion to dismiss.

³⁷See **Quarterly Report** July-September: 1996 and **Quarterly Report** July-September: 2002, as well as **Quarterly Report** October-December: 1999.

³⁸FRCP 12(b)(6) motions are “granted only when it appears without a doubt that the plaintiff can prove no set of facts in support of the claims that would justify relief.” *Id.* at 788. Additionally, the allegations in the complaint are viewed in light most favorable to the plaintiffs.

Constitutional Violation

The school alleged that the student did not have a valid claim under §1983 because the student had not alleged a “violation of rights secured by the Constitution or law of the United States.” *Id.* at 790. Although the student’s complaint did not specifically address the constitutional violation, the federal district court, however, disagreed with the school and held that the student had a Fourth Amendment right against “unreasonable searches and seizures” as well as a Fourteenth Amendment Substantive Due Process right to bodily integrity. Even though the school maintained that the student was assaulted by another student and not a school employee, the court pointed out that the claim was a result of systematically inadequate supervision.

Furthermore, the school argued that the student’s “negligent supervision claim fail[ed] because the government has no duty to protect individuals from private violence in the absence of a special relationship.” *Id.* The school cited to *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1980), where the county department of social services was aware of a small boy who was beaten by his father but did not attempt to remove the child from the home. After a beating which left the boy permanently brain damaged, the mother sued the department of social services. However, the court “rejected the contention that the government owes a constitutional duty to protect people from misdeeds of other private actors. . . [further concluding that] a State’s failure to protect an individual from private violence simply does not constitute a violation of the *Due Process Clause*.” *Id.* at 791, quoting from *DeShaney*, 489 U.S. at 195-97 (emphasis original). There is, however, an exception to this rule: when a “special relationship” exists between an individual and the state. The *DeShaney* court held that “[w]hen a State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.” *Id.*, quoting from *DeShaney*, 489 U.S. at 198-200.

The court cited three 5th Circuit cases regarding sexual abuse of public school students and the argument as to whether or not a “special relationship” existed within the *DeShaney* exception. The first case, *Doe v. Taylor Independent School District*, 15 F.3d 443 (5th Cir. 1994),³⁹ held that public school students have a “substantive due process right to bodily integrity.” Furthermore, the court specified “that physical sexual abuse by a school employee violates that right; and that school officials can be liable for failure to supervise if that failure manifests a ‘deliberate indifference’ to the victim’s constitutional rights.” *Teague*, at 791, quoting *Doe*, 15 F.3d at 445. The second case, *Walton v. Alexander*, 44 F.3d 1297 (5th Cir. 1995), did not expand the holding in *Doe*. After the victim, a resident student at the Mississippi School for the Deaf, was attacked for a second time by a another resident student, the victim filed a §1983 claim against the superintendent, arguing that there was a “special relationship” with the state, and the superintendent failed to protect him. However, the court held that “a special relationship arises *only* when a person is *involuntarily confined or otherwise restrained against his will*.” *Teague*, at

³⁹ In *Doe v. Taylor Independent School District*, a 15-year-old student was molested by her high school biology teacher. The student filed a §1983 claim against her teacher, the school, the school’s principal and the district’s superintendent, alleging that they permitted the abuse.

792, quoting Walton, 44 F.3d. at 1299 (emphasis added). Finally, in Doe v. Hillsboro Independent School District, 113 F.3d 1412 (5th Cir. 1997), involving a 13-year-old student raped by a school janitor, the 5th Circuit addressed the issue whether compulsory attendance laws created a special relationship between a student and a school. The 5th Circuit held that “compulsory attendance laws *alone* [do not] create a special relationship giving rise to a constitutionally rooted duty of school officials to protect students from private actors. . .[, therefore] not creating the custodial relationship envisioned by DeShaney.” Teague, at 792, quoting Doe v. Hillsboro Independent School District, 113 F.3d at 1415 (emphasis added). The language does not foreclose the creation of a “special relationship” where a child is compelled to attend school. However, there would have to be additional factors that would give rise to a “special relationship.”

In this case, the court recognized that the student, because of her Down’s syndrome, was not the “typical” high school student. Thus, the court found that this case was “fundamentally different” from Walton, where the student had a physical disability (deafness) but no mental disability. As a result of the mental retardation, which impacted her ability to function in society, the court acknowledged that she lacked the skills to “fend off unwanted sexual advances.” Id. at 792. Therefore, because of the attendance laws and having to attend class in a specially segregated classroom in which students are not free to leave, she was completely dependent upon those in charge. This court made its sentiments clear when it stated:

This Court will not require these children to put themselves at the mercy of sexual predators. . . through systemic deficiencies. Schools must recognize the helplessness of these children and take appropriate steps to keep them from harm, and especially not add salt to the wound by such intrusive practices as ludicrous nude searches.

Id. at 793. Referring to the holdings in both the DeShaney and Hillsboro, the court concluded that “mentally disabled students who attend public school under Texas’s compulsory attendance laws, in specially designed and segregated special education classes, are involuntarily confined and thus enjoy a special relationship with their school district.” Id. Furthermore, the court held that the school has a “duty of reasonable care to protect their special education mentally disabled students’ substantive due process right to bodily integrity,” and the student may recover under §1983 if the school violates its duty of care. Id.

COURT JESTERS: DEED MOST FOWL

Why did the chicken cross the road?

Better yet: Why did The Chicken cross the Barney?

The Chicken (a/k/a “The Famous Chicken,” “The San Diego Chicken,” Ted Giannoulas) is a mainstay at professional sporting events, especially baseball games.⁴⁰ Barney is...well, Barney just *is*. While Godzilla must meet every other conceivable Japanese monster, it was inevitable The Chicken and Barney would meet, but their battle occurred in a much more intimidating atmosphere than Godzilla’s Monster Island. They met in a court of law.

Lyons Partnership v. Ted Giannoulas, d/b/a Famous Chicken, 179 F.3d 384 (5th Cir. 1999) exemplifies author/editor Malcolm Muggeridge’s observation that “Good taste and humor are a contradiction in terms[.]” Who are the combatants? “[T]he Chicken is renowned for his hard-hitting satire. Fictional characters, celebrities, ball players, and, yes, even umpires are all targets for The Chicken’s levity. Hardly anything is sacred.” 179 F.3d at 386.

Barney is “a six-foot-tall purple ‘tyrannosaurus rex’ [who] entertains and educates young children. His awkward and lovable behavior, good-natured disposition, and renditions of songs like ‘I love you, you love me,’ have warmed the hearts and captured the imaginations of children across the United States.” *Id.* at 385.

“And so, perhaps inevitably, the Chicken’s beady glare came to rest on that lovable and carefree icon of childhood, Barney.” *Id.* at 386. The Chicken incorporated into its act “Duffy the Dragon” who “had a remarkable likeness to Barney’s appearance, [and who] would appear next to the Chicken in an extended performance during which the Chicken would flip, slap, tackle, trample, and generally assault the Barney look-alike.” *Id.* The court provided a more detailed description of the routine.

The sketch would begin with the Chicken disco dancing. The Barney character would join the Chicken on the field and dance too, but in an ungainly manner that mimicked the real Barney’s dance. The Chicken would then indicate that Barney should try to follow the Chicken’s dance steps (albeit, by slapping the bewildered dinosaur across the face). At this point, Barney would break character and out-dance the Chicken, to the crowd’s surprise. The Chicken would then resort to violence, tackling Barney and generally assaulting Barney. Barney would ultimately submit to the Chicken and they would walk off the field apparently friends, only for the Chicken to play one last gag on the back-in-character naive and trusting Barney. The Chicken would flip Barney over a nearby obstacle, such as a railing.

⁴⁰The Famous Chicken, who appeared in 1974, has engaged in his crowd-pleasing shenanigans in all 50 states as well as eight other countries. He has appeared with U.S. presidents and was named by *Sporting News* as one of the 100 most powerful “people” in sports during the 20th century. How popular is The Chicken? He/it was recently the first mascot inducted into “The Mascot Hall of Fame” in Philadelphia, ahead of such commercial icons as Ronald McDonald and Mickey (*née* Mortimer) Mouse. *Bloomberg News*, August 17, 2005.

Id. at 387. There is apparently a limit to Barney’s “good-natured disposition.” Barney filed suit against The Chicken, alleging trademark infringement, false association, and copyright infringement, along with other claims, to defend against The Chicken’s “assault on [children’s] bastion of child-like goodness and naivete.” The “lovable” dinosaur regaled the court “with tales of children observing the performance who honestly believed that the real Barney was being assaulted. In one poignant account...a parent describes how the spectacle brought his two-year-old child to tears.” Barney told the court that “only after several days of solace was the child able to relate the horror of what she had observed in her own words–‘Chicken step on Barney’–without crying.” Id. at 386.

The Chicken squawked at such self-serving anecdotal recitations. True, the Chicken acknowledged, he did depict Barney “with his large, rounded body, never changing grin, giddy chuckles, and exclamations like ‘Super-dee-Dooper!’,” but the Chicken considers Barney “to be a symbol of what is wrong with our society—a homage, if you will, to all the inane, banal, platitudes that we readily accept and thrust unthinkingly upon our children.” Id.

The court noted the Chicken might have a point. There are others who have criticized the “insipid and corny qualities” of this “children’s icon” who is “pot-bellied,” “sloppily fat,” and “giggles compulsively in a tone of unequaled feeble-mindedness,” jiggling “his lumpish body like an overripe eggplant.”⁴¹ The court also noted legitimate criticism of Barney—“that his shows do not assist children in learning to deal with negative feelings and emotions.” According to one critic, “Barney offers our children a one-dimensional world where everyone must be happy and everything must be resolved right away.” Id.

The Chicken was in cluck. The court noted that “a reference to a copyrighted work or trademark may be permissible if the use is purely for parodic purposes.” The Chicken did use a character that dressed and danced like Barney, but no other references to Barney were made. “He did not, for instance, incorporate any of Barney’s other ‘friends’ into his act, have the character imitate Barney’s voice, or perform any of Barney’s songs. According to [the Chicken], Barney was clearly the butt of a joke, and he referenced the Barney character only to the extent necessary to conjure up the character’s image in his audience’s mind.” Id. at 388.

Barney’s assertions to the contrary were “completely meritless.” The Chicken’s “humor came from the incongruous nature of such an appearance, not from an attempt to benefit from Barney’s goodwill.” The Chicken’s antagonistic action towards Barney, “even at its inception...was clearly meant as a parody.” Id.

It seems reasonable to us to expect that most comedians will seek to satirize images or figures who will be widely recognized by their audiences. It therefore

⁴¹The court was actually quoting excerpts from an article that appeared in a 1993 edition of *The New Yorker*.

seems unlikely that comedians will target trademarks that do not have significant strength.

Id. at 389. “We note that in this case the conduct was, without doubt, a parody.” Id. at 390. In fact, the parody was so obvious and Barney’s arguments so meritless, Barney was ordered to pay the Chicken’s attorney fees. Id. at 388, *n.* 5.

That ain’t chicken feed.

QUOTABLE . . .

All declare for liberty and proceed to disagree among themselves as to its true meaning. There is equal unanimity that opportunists, for private gain, cannot be permitted to arm themselves with an acceptable principle, such as that of a right to work, a privilege to engage in interstate commerce, or a free press, and proceed to use it as an iron standard to smooth their path by crushing the living rights of others to privacy and repose.

Justice Stanley Reed, writing for a unanimous U.S. Supreme Court in Breard v. Alexandria, 341 U.S. 622, 625-26, 71 S. Ct. 920, 923-24 (1951), upholding the conviction of a door-to-door salesman—that annoying forerunner to the equally annoying telemarketer—who plied his trade without complying with a local ordinance that required him to obtain the consent of the local owners of residences before knocking on their doors.

UPDATES

Pledge of Allegiance

The U.S. Supreme Court has yet to rule on whether Congress’s 1954 insertion of “under God” into the Pledge of Allegiance violates the First Amendment’s Establishment Clause.⁴² Last year’s ruling in Elk Grove Unified School District, et al v. Newdow, et al., 542 U.S. 1, 124 S.Ct. 2301 (2004) avoided the question by finding that Michael Newdow did not have standing to prosecute his Establishment Clause dispute on behalf of his minor daughter.⁴³

⁴²“Congress shall make no law respecting an establishment of religion.”

⁴³See “The Pledge of Allegiance: ‘One Nation, Under Advisement,’” **Quarterly Report** April-June: 2004. Also consult the Cumulative Index for other articles on the Pledge of Allegiance.

A number of state legislatures have been considering changes to their state laws, ostensibly to increase patriotic and civic sensibilities. To this end, legislatures are requiring daily recitation of the Pledge of Allegiance, daily Moments of Silence,⁴⁴ and displays of the American flag in every classroom. Indiana has been no different.

The 2005 session of the Indiana General Assembly passed P.L. 78-2005, which, in part, required the display of the United States Flag in each classroom; the daily opportunity to recite the Pledge of Allegiance in each classroom or on school grounds, with an exemption for those students who choose not to participate or whose parent chooses not to have the student participate;⁴⁵ and the daily observance of a moment of silence in each classroom or on school grounds.⁴⁶

Newdow vowed to return, but he may not get his chance. Another case arising out of Virginia rather than California (and involving a devoutly religious parent rather than an atheist), will likely draw the highest court's attention.

In Myers v. Loudoun County Public Schools, Commonwealth of Virginia, 418 F.3d 395 (4th Cir. 2005), the parent—on his own behalf as well as his minor children—challenged Virginia's statute that requires the schools to provide for the daily, voluntary recitation of the Pledge of Allegiance. The parent belongs to a faith tradition that requires allegiance to “Christ's kingdom, not the state or society.” He believes the Recitation Statute promotes a “‘God and Country’ religious worldview” that he asserts is repugnant to his religion. Slip Opinion at 397-98.⁴⁷

The statute, which the school district's policy is based upon, reads in relevant part:

Each school board shall require the daily recitation of the Pledge of Allegiance in each classroom of the school division and shall ensure that the flag of the United States is in place in each such classroom. Each school board shall determine the appropriate time during the school day for the recitation of the Pledge....
[H]owever, no student shall be compelled to recite the Pledge if he, his parent or legal guardian objects on religious, philosophical or other grounds to his participating in this exercise. Students who are thus exempt from reciting the

⁴⁴See “Moment of Silence,” **Quarterly Report**, January-March: 2001.

⁴⁵I.C. § 20-30-5-0.5. It is noteworthy that Indiana does not require the student or the student's parent to declare any reason for declining to recite the Pledge of Allegiance.

⁴⁶I.C. § 20-30-5-4.5. P.L. 78-2005 also amended I.C. § 4-6-2-1.5 to require the Indiana Attorney General to defend a school corporation that is made a party to a civil suit arising under the statutes requiring the voluntary recitation of the Pledge of Allegiance, the display of the U.S. flag, or the observance of the daily moment of silence.

⁴⁷How high are the stakes? The Commonwealth of Virginia intervened to defend the statute. It was not alone in opposing Myers. Not only did the United States intervene, but thirty (30) other States participated as *amici curiae* in support of Virginia. Indiana was one of the States.

Pledge shall remain quietly standing or sitting at their desks while others recite the Pledge and shall make no display that disrupts or distracts others who are reciting the Pledge....

Id. at 398. The federal district court ruled against Myers, finding the challenged statute did not have a religious purpose or effect, did not result in excessive entanglement between government and religion, and the daily recitation was not a religious exercise.⁴⁸ Id. at 397. The three-judge panel of the 4th Circuit affirmed, albeit through three separate opinions.

Judge Karen J. Williams wrote the opinion of the court, during which she recited a brief history of the Pledge since Congress became involved in 1942.⁴⁹ Judge Williams then detailed the history of religious influences in American public life, from its founding to the present. She noted that the Establishment Clause does not forbid any religious references within the public or governmental context, citing, *inter alia*, Supreme Court cases approving prayer before legislative sessions, tax credits, and support of so-called “Blue Laws”; language in The Declaration of Independence; Thanksgiving Proclamations; the Gettysburg Address; presidential inaugural addresses; the National Motto (“In God We Trust”); and similar “patriotic references to the Deity,” which are sometimes described as “ceremonial deism.” Id. at 402-04.⁵⁰

If the founders viewed legislative prayer and days of thanksgiving as consistent with the Establishment Clause, it is difficult to believe they would object to the Pledge, with its limited reference to God. The Pledge is much less of a threat to establish a religion than legislative prayer, the open prayers to God found in Washington’s prayer of thanksgiving, and the Declaration of Independence.

Id. at 405. Judge Williams also noted there is considerable dicta by the Supreme Court regarding the Pledge of Allegiance. No member of the Supreme Court, during such musings, has ever intimated that the Pledge, as amended by Congress in 1954, offends the Establishment Clause. Id. at 405-06. She noted that although the Circuit Courts are not bound by dicta or separate opinions of the members of the Supreme Court, “observations by the Court, interpreting the First

⁴⁸The federal district court was applying the three-prong test derived from Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105 (1971).

⁴⁹The Pledge is codified at 4 U.S.C. § 4.

⁵⁰Judge Williams noted that “under God” was used by President Abraham Lincoln in his famous Gettysburg Address. Id. at 15. She also described the term “ceremonial deism” as “somewhat disconcerting” because of the suggestion that originally such phrases as “In God We Trust” and “Under God” would violate the Establishment Clause, but were rendered meaningless through repetition. This “provides no account for why only words with religious connotations lose meaning, and not words like ‘liberty, and justice for all.’” Id. at 17, *n.* 11, citing to Sherman v. Community Consolidated Sch. Dist. 21, 980 F.2d 437, 448 (7th Cir. 1992) (Manion, J., concurring). Sherman was the first Circuit Court decision involving a challenge to the Pledge of Allegiance on Establishment Clause grounds. The 7th Circuit found no constitutional problem.

Amendment and clarifying the application of its Establishment Clause jurisprudence, constitute the sort of dicta that has considerable persuasive value in the inferior courts.” *Id.* at 406, citing Lambeth v. Bd. of County Commissioners, 407 F.3d 266, 271 (4th Cir. 2005) and Sherman, 980 F.2d at 448.

The court was likewise dismissive of Myers’ assertion that the daily recitation of the Pledge constituted a type of coercion into accepting a religious message, relying upon Lee v. Weisman, 505 U.S. 577, 112 S. Ct. 2649 (1992). First, the court noted, recitation of the Pledge is not a “religious exercise,” despite Myers’ subjective belief. Rather, recitation of the Pledge is a patriotic activity. *Id.* at 406-07. Second, the “inclusion of those two words [“under God”]...does not alter the *nature* of the Pledge as a patriotic activity. The Pledge is a statement of loyalty to the flag of the United States and the Republic for which it stands[.]” *Id.* at 407 (emphasis original). Third, the Pledge is not a prayer. “Even assuming that the recitation of the Pledge contains a risk of indirect coercion, the indirect coercion is not threatening to establish religion, but patriotism.” *Id.* at 408.

Judge Allyson K. Duncan, in her concurring opinion, agreed the recitation of the Pledge does not violate the Establishment Clause; however, she expressed the opinion that Judge Williams’ historical antecedents were excessive and unnecessary. *Id.* at 408-09. This case, she wrote, is best resolved through reliance upon Supreme Court dicta and other authority that support the Pledge recitation as a patriotic rather than a religious exercise. *Id.* at 409.

Judge Diana Gribbon Motz, concurring only in the judgment, believes that reliance upon dicta is sufficient to affirm the federal district court. The “line-drawing” attempted by Judge Williams exceeded the question before the court. *Id.* at 409-11.

Although this case began not as a constitutional challenge to “under God” but to the Pledge of Allegiance itself, the issue has become the one Newdow raised previously. As Judge Williams noted:

Although, on appeal, the United States has intervened to defend the constitutionality of the Pledge statute, it is worth noting that Myers’s challenge is not to the Pledge statute itself, but to the Recitation Statute’s requirement that the Pledge be recited in Virginia public schools. In addition to the amicus brief of the United States, the State of Alabama, joined by thirty other states, has filed an amicus brief supporting the constitutionality of the Recitation Statute.

Id. at 399, *n.* 4. This could be the case where the U.S. Supreme Court determines the constitutionality of the phrase “under God” as added by Congress in 1954. Although the 4th Circuit panel made much of the dicta of the Supreme Court in this regard, it is also noteworthy that in the Supreme Court’s previous decision where it found Newdow did not have standing, Elk Grove, *supra*, the Supreme Court issued its decision on June 14th—Flag Day.

Visitor Access To Public Schools

Although Indiana does not have a law that specifically requires public school districts to have visitor policies and procedures,⁵¹ most school districts have instituted such policies and procedures as a means of ensuring the safety of students and staff. Well publicized acts of violence occurring at public schools have had an impact on eroding the immunity from tort claims that public schools often enjoy, altering such access procedures from discretionary to ministerial functions. The net result: public schools, even in the absence of a law directing the creation of such policies, are realizing a duty may exist, the breach of which—if the proximate cause of injury—could result in the finding of actionable negligence.

The latest “visitor access” case is Leake v. Murphy, 617 S.E.2d 575 (Ga. App. 2005), a case where an elementary school child was savagely attacked in the hallway by a mentally ill individual. The Georgia legislature passed a law that required “[e]very public school shall prepare a school safety plan to help curb the growing incidence of violence in schools [and] to respond effectively to such incidents.... School safety plans shall address security issues.”⁵² Unfortunately, the Gwinnett County Board of Education did not prepare a school safety plan, although the elementary school did establish a sign-in procedure for visitors.

One year prior to the attack on the child, William Cowart, a mentally ill convicted felon, walked into the elementary school holding a picture of a young girl. The principal confronted him and he left the building. The principal called the police. Thereafter, the elementary school instituted an “access control policy” that involved stationing an individual in the lobby to screen persons entering the school and require them to sign in at the principal’s office. The principal’s staff could monitor individuals entering and leaving the school through a floor-to-ceiling glass window. 617 S.E.2d at 577.

The following year, a different individual—Chad Brant Hagaman, “a paranoid schizophrenic who heard voices telling him to kill people”—walked through the school’s front doors armed with a hammer. No one apparently challenged him. He walked past the principal’s office where he came upon a group of fourth-grade students lined up in the hallway. He embedded the claw end of the hammer in the skull of a ten-year-old girl, penetrating her brain and leaving her with permanent neurological deficits as well as post-traumatic stress disorder. 617 S.E.2d at 577-78.

The parents sued the school board and certain school personnel. The trial court found the school board and school personnel were entitled to official immunity, but the appellate court reversed this determination as to school board members and the superintendent, finding that their failure to prepare a school safety plan, as directed by statute, negates any grant of official immunity because the requirement to do so was ministerial in nature and not discretionary. Official immunity is not available to one required to discharge a ministerial function. Id. at 578.

⁵¹See “Visitor Access to Public Schools: Constitutional Rights and Retaliation,” **Quarterly Report** January-March: 2005.

⁵²OCGA § 20-2-1185.

The legislative use of the word “shall” mandated the preparation of a school safety plan. “The duty is absolute, and, as a result, ministerial.” This duty was imposed on the county school superintendent and the count board of education, not the principal and her staff. “Accordingly, we hold that the duty to prepare a school safety plan for the school at issue fell to [the superintendent] and the Board members. We further hold that the remaining defendants, the principal and her front office staff, are not vested by the legislature with rule-making authority and thus cannot be held liable for damages for failure to prepare such a plan.” *Id.* The unsuccessful visitor-access plan instituted by the principal was not a school safety plan created by the school board and superintendent.

The Georgia Court of Appeals acknowledged that the legislative use of “security issues” did not define just what those issues would be.

The legislature has not given specific direction on what elements to include in a safety plan; for example, whether to install electronic scanning devices at the entrance to the school, or to keep the doors locked such that visitors gain entrance by buzzer. These procedures would necessarily differ from school to school, and addressing these issues is left to the discretion of the school authorities....

Id. at 579. “It is the total absence of any [school safety] plan which precludes dismissal of the lawsuit.” *Id.* at 580.

Date: _____

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